

# United States Court of Appeals

FOR THE  
NINTH CIRCUIT

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MELEANA KALEHUA,

Plaintiff-in-Error,

vs,

HENRY CLARK,

Defendant-in-Error,

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## BRIEF OF DEFENDANT IN ERROR

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*Upon Writ of Error to the Supreme Court of the  
Territory of Hawaii*

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ANTONIO PERRY,

C. A. LONG,

NOA W. ALULI,

Attorneys for Defendant-in-Error.

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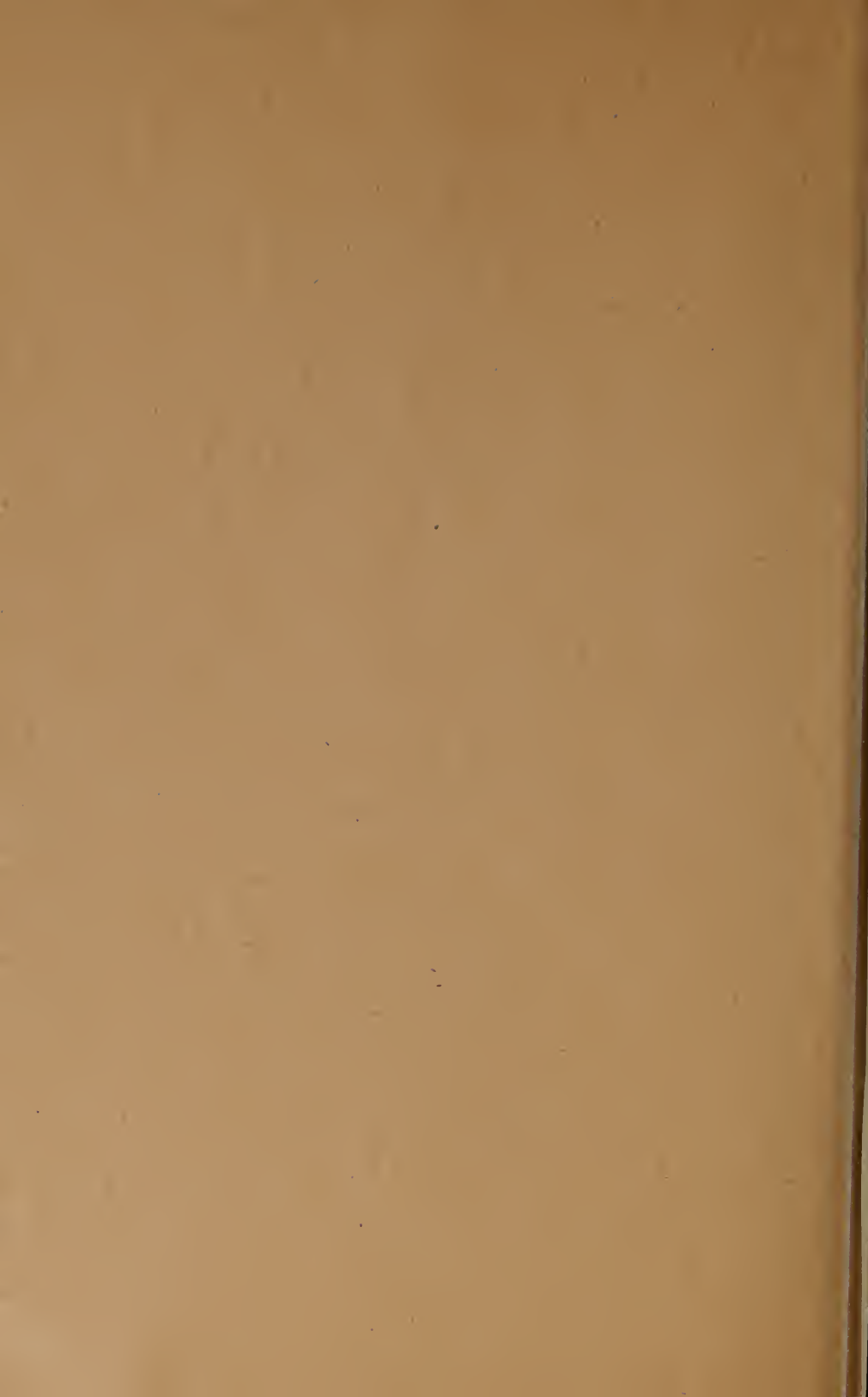
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#### I.

#### STATEMENT OF FACTS.

a. In October of 1910, defendant-in-error married Emma Dreier. They lived continuously in Honolulu, where they separated and last lived as husband and wife in July, 1911. (Record, p. 36.)

b. August 2, 1911, Emma Dreier Clark filed a libel of divorce, charging defendant-in-error with "extreme cruelty" and "failure to support." On the following day, the libel and summons were served, and defendant-in-error filed his answer, admitting all of the allegations, excepting the "ill-treatment" and the

“failure to support.” (Record, pp. 36-37, 38, 39, 40, 41.)

c. August 8, 1911, six days after service, trial was had, and the decree (“first decree”) of divorce was rendered on the same day by Circuit Judge Robinson. (Record, pp. 46, 47.)

d. On October 19, 1911, the Supreme Court of Hawaii, in *Markle v. Markle*, in accordance with amended Section 2230 of the Revised Laws of Hawaii, to-wit: “The judge shall not entertain jurisdiction of the libel until at least thirty days after service shall have been completed,” held, that “Circuit judges are without jurisdiction to hear or determine divorce cases until the expiration of thirty days after the completion of service of summons on the libellee, in whatever method service may be accomplished, or after appearance without service.” (Revised Laws of Hawaii 1905, as amended by Act 25, Session Laws 1909. *Markle v. Markle*, 20 Haw. 633, 634, 635.)

e. On October 23, 1911, Judge Robinson, complying with the decision of the said Markle case, ordered the decrees in the hundred or more divorce cases which he had heard and rendered decrees before the expiration of the “thirty days after service,” including the Clark case, set aside. (Record, pp. 60, 61, 62.)

f. On October 26, 1911, more than thirty days after service on defendant-in-error, Judge Robinson retried said Clark case, and on the same date granted the divorce and signed the “second decree.” (Record, pp. 48-49.)

Jurisdictional allegations were duly proven in the second trial. "Second decree" perfect—no jurisdictional defect. (Record, pp. 50, 51, 52, 53, 54, 55.)

g. On August 6, 1912, over one year after the "second decree," defendant-in-error married Alexandrina Leihulu Keohokalole, owner of the lands herein. (Record, p. 24.)

h. On March 23, 1914, she, Alexandrina Leihulu Clark, died, leaving no issue, father, mother, brother, sister nor descendants of any deceased sister or brother. She died intestate and left surviving her said defendant-in-error. (Record, pp. 24, 25.)

i. In August, 1916, in the Matter of the Estate of said Alexandrina Leihulu Clark, in 23 Haw. 451, where the "second decree" was attacked, the Supreme Court of Hawaii held: "A decree of divorce rendered by a court having jurisdiction of the subject matter and of the parties cannot be collaterally attacked for errors or irregularities; that libellee is not notified of the time of the second trial, the original decree having been vacated, is not such a jurisdictional defect as will render the second decree void.

\* \* \* Where a decree in a suit for divorce is vacated because thirty days had not elapsed after the completion of service of summons on the libellee, it is proper for the court to treat the suit as still pending and re-try the same, after the expiration of the thirty days limited by statute, upon the evidence then adduced." (Record, pp. 68, 69, 70, 71, 72, 73, 74, 75.)

j. In September, 1916, after the decision in the



said estate matter, the plaintiff-in-error filed her complaint. Defendant-in-error filed his answer of general denial and waiver of jury trial. (Record, pp. 12-23.)

k. In October, 1916, the parties herein stipulated that said Alexandrina Leihulu Clark, deceased, was the owner of said lands; that she married defendant-in-error on August 6, 1912; that she died intestate on March 23, 1914, leaving the said defendant-in-error, and leaving no issue, father, mother, brother or sister or nephew or niece. (Record, pp. 24-25.)

l. On February 14, 1914, this cause was heard by Circuit Judge Ashford.

For the plaintiff-in-error to succeed, the "second decree" had to be attacked and set aside, in order, to make out, that there was no valid divorce between defendant-in-error and his first wife (Emma Dreier), so that defendant-in-error could not be the lawful husband of Alexandrina Leihulu Clark—so that Clark could not inherit, could not be the sole heir of his wife. Plaintiff-in-error then offered Record No. 4304, of the Clark case, in order to attack said "second decree."

Defendant-in-error objected to its introduction, because it could not be collaterally attacked, by a stranger, and that the said decree had been held by the Territorial Supreme Court to be valid.

The court admitted the said Record. (Record, pp. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64.)

m. To show why and how the "second decree" was



made and entered, defendant-in-error offered, which was allowed without objection, the Clerk's minutes, showing the order of Judge Robinson setting aside the "first decree"—showing the reason for the order, namely, that said "first decree" was void in that he (Judge Robinson) had no jurisdiction to hear before the expiration of the thirty days after service—further showing the second hearing and the rendering of the "second decree." (Record, pp. 59, 60, 61, 62.)

n. Judge Ashford then found for the defendant-in-error, holding that the "second decree" was good and valid and that he was the sole heir of his wife, following the decision in the matter of the Estate of Alexandrina Leihulu Clark, Deceased. (Record, pp. 29, 30, 31, 32, 33, 34.)

o. Plaintiff-in-error appealed from the decision of Judge Ashford and the Supreme Court of Hawaii sustained the trial court, confirming its decision in *Estate of Clark*, supra. (Decision. Record, pp. 65, 66, 67.)

p. From said decision, plaintiff-in-error appealed to this Honorable Court, contending that said "second decree" is void and of no effect. (Record, pp. 78-79.)

q. The laws of descent of Hawaii is as follows: "If the intestate shall leave no issue nor father, mother, brother or sister, nor descendants of any deceased brother or sister, the estate shall descend to the intestate's widow, if any, or in case the intestate be a woman, to the husband, if any." (Revised Laws of Hawaii, 1905, Section 3246.)

r. The Revised Laws of Hawaii, in divorce, does not state that the time or notice of hearing be given a libellee. (Revised Laws of Hawaii 1905, Chapter 167.)

## II.

### *THE QUESTIONS ARE:*

Was the "second decree" legally rendered? Can it be collaterally attacked?

Should this Honorable Court decide the said decree valid and/or that it cannot be collaterally attacked, then Henry Clark, libellee in said divorce case and defendant-in-error herein, was the legal husband of Alexandrina Leihulu Clark, and under the stipulation and according to the laws of Hawaii, he was and is the sole heir of her estate and to the lands herein involved.

## III.

### *BRIEF OF THE ARGUMENT.*

1. A court has the inherent right to set aside its void decree, and when it so acts, the libel, summons and other pleadings on file, do not thereby become useless or void.

2. Where the statute require, in a divorce suit, that thirty days must expire after service had been made upon the libellee, before the court could assume jurisdiction, and where the court heard a case before that time had expired, the libel and summons are still good and valid, and that upon a second

hearing after the thirty days after service had expired, the "second decree," based upon the same libel and summons, is good, valid and legal.

3. Where the statute does not require that a notice of the time of hearing be given the libellee, a decree rendered without such notice is good, valid and legal.

4. A divorce decree valid upon its face cannot be collaterally attacked, when there is no jurisdictional defect and when the court had jurisdiction, by personal service, over the libellee. An injured spouse may by direct proceedings only, but a stranger, never by direct or collateral proceedings.

#### IV.

#### *ARGUMENT.*

##### 1. INHERENT RIGHT OF COURT TO SET ASIDE ITS VOID DECREE.

Hearing and decree was had and entered six days after service on the defendant-in-error in the Clark case, and then came the Markle decision holding that thirty days after service must elapse before the court could assume jurisdiction. Circuit Judge Robinson, who had rendered the decree, complying with the said decision, formally ordered it set aside.

Judge Robinson had the inherent right to set aside the said decree, for it was void and of no effect for want of jurisdiction to hear.

"The power to vacate, open, or set aside a judgment is a common-law power inherent in courts of

general jurisdiction and may be exercised without the grant of special statutory authority."

23 Cyc. 889.

"The authority to vacate or set aside judgments is incident to all courts of record." "The power to vacate a judgment must be exercised by the court which rendered the judgment."

23 Cyc. 890-1.

2. "FIRST DECREE" VOID AS JUDGE ROBINSON HAD NO JURISDICTION TO HEAR UNTIL THE THIRTY DAYS AFTER SERVICE HAD EXPIRED, "SECOND DECREE" VALID BEING RENDERED AFTER THIRTY DAYS AFTER SERVICE.

The Supreme Court of Hawaii, in the Markle case, held that the decree rendered therein was void and of no effect, and said, "remanded to the Circuit Judge with instructions to set aside the decree and for further proceedings as might be appropriate." By this expression, said court did not hold that the libel, summons and other pleadings were useless, void and of no effect; nor did it mean that a second hearing or "second decree" could not be held or entered upon the old, original and the then existing pleadings. Said court could not have set aside the libel and summons in the said Markle case, for it did not have the right or jurisdiction to do so, for it did not have anything to do with the said pleadings, for the sole attack was directed at the "decree" and at the court

for assuming jurisdiction before the thirty days after service had expired, which was contrary to the amended Section 2230 of the Revised Laws of Hawaii, and when the jurisdiction of the court was successfully assailed, consequently, that which was based upon said void hearing, namely, the said "first decree," was the only pleading effected.

The libel and summons in said Clark case, being still good and valid, for the first hearing was merely a mis-trial, the "second decree" was proper and legal. The first decree was simply set aside, and left the said parties where they originally were.

*"Operation and Effect of Vacating or Opening.* Where a judgment is vacated or set aside, it is entirely destroyed and the rights of the parties are left as if no such judgment had ever been entered." "It leaves the action still pending and undetermined and justifies further proceedings therein."

23 Cyc. 973, 974.

Also,

*Kelly v. Harrison* (Miss.), 12 So. 261, 262.

Estate of Clark, 23 Haw. 451, on page 456.

### 3. HAWAIIAN STATUTES, IN DIVORCE, DO NOT REQUIRE THAT TIME OF HEARING BE GIVEN LIBELLEEE (DEFENDANT-IN-ERROR).

It is not necessary that notice of the time of hearing should have been given to the libellee (defendant-in-error).

The statute does not provide that notice be given.

"In the absence of statute providing otherwise,



the parties to a cause where the court has properly obtained jurisdiction over them are not entitled to a notice of the trial, or of fixing a day for trial."

38 Cyc. 1271.

"In this Territory there is no statute requiring the giving of notice of trial."

Estate of Clark, 23 Haw. 455.

#### 4. COURTS DO NOT, UPON COLLATERAL ATTACK, WHERE NO JURISDICTIONAL DEFECT, SET ASIDE A DECREE VALID UPON ITS FACE.

The "second decree," upon its face, is valid. The transcript of the lower court conclusively shows that jurisdictional allegations were proven.

The objections by a stranger to the records that a second hearing or "second decree" in said divorce case could not be heard or rendered upon the original pleadings and that no notice of the date of hearing was given to Clark, if good, which we do not admit, were and are not jurisdictional defects or objections.

The trial court, having jurisdiction over the subject matter and it having obtained jurisdiction by personal service over the person of defendant-in-error, we submit that the fact that the "first decree" was void and the fact that no notice of hearing was given, did not divest the trial court of its jurisdiction theretofore acquired.

There being no jurisdictional defect, said decree cannot be collaterally attacked—cannot be collaterally attacked by a stranger.

"A decree of divorce rendered by a court having jurisdiction of the subject matter and of the parties cannot be collaterally attacked for errors or irregularities; that libellee is not notified of the time of the second trial, the original decree having been vacated, is not such a jurisdictional defect as will render a second decree void.

"Where a decree in a suit for divorce is vacated because thirty days had not elapsed after the completion of service of summons on the libellee it is proper for the court to treat the suit as still pending and re-try the same, after the expiration of the thirty days, limited by statute, upon the evidence then adduced."

In Re Estate of Clark, 23 Haw. 451.

"Where, however, the court had jurisdiction of the parties and the subject-matter its decree cannot be collaterally attacked because of mere error or irregularity."

14 Cyc. 723.

"It is the duty of the courts to set their faces against all collateral assaults on judicial proceedings."

"A collateral attack on a judicial proceeding is an attempt to avoid, defeat or evade it, or to deny its force and effect in some manner not provided by law."

"An attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree or enjoining its execution."

Van Fleet's Collateral Attack, pp. 3-5.

"Strangers to the divorce suit are not entitled to have an invalid decree of divorce set aside. That right usually exists only in favor of the injured spouse."

14 Cyc. 721.



## V.

*CONCLUSION.*

a. There is no question of fraud or collusion. There is no question of some pre-existing rights of the plaintiff-in-error being affected by said decree. Whatever Emma Dreier Clark and defendant-in-error did in their divorce case was their own concern and it affected their own property rights.

b. Emma Dreier Clark is not attacking the decree. At this late day, a stranger, namely, the plaintiff-in-error, to sustain her cause, is asking to set it aside, not in a divorce matter, where the courts would probably have more patience, but in a land case.

Is the plaintiff-in-error to be permitted to ask Your Honors to make Emma Dreier Clark and defendant-in-error still husband and wife?

c. Has this stranger that interest in the Clark case as to give her a standing to attack collaterally a decree valid upon its face?

The marriage of the defendant-in-error to the owner of the lands herein, is stipulated. It is agreed that defendant-in-error is her sole heir.

We submit that the decisions of the Supreme Court of Hawaii in favor of defendant-in-error be sustained.

Respectfully,

ANTONIO PERRY,

C. A. LONG,

NOA W. ALULI,

Attorneys for Defendant-in-Error.